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# A SHEEP IN WOLF'S CLOTHING: THE MICHIGAN CIVIL RIGHTS INITIATIVE AS THE SAVIOR OF AFFIRMATIVE ACTION

Ryan C. Hess\* †

The University of Michigan has long been a place of important discussions about civil and human rights. On the steps of the Michigan Student Union, only a few paces from the Law School, lies an inconspicuous marker where then-President John F. Kennedy, Jr. dedicated the United States Peace Core. During the Vietnam War, the University played host to significant protests that changed how we think about war and its consequences. Most recently, the University litigated a series of Supreme Court cases that have helped define the role of educational institutions in the quest for equality. This role promises to continue given the passage of the Michigan Civil Rights Initiative ("MCRI").

I decided to study law at the University of Michigan partly due to its past and continuing presence in civil rights debates, but I must admit that I have been disappointed. As I listened to University President Mary Sue Coleman's speech regarding the MCRI's adoption by Michigan voters, I didn't experience what I had hoped to feel: a religious fervor against injustice, a deep-seeded anger, a belief that what had happened was wrong. Even when I hear people talk about "building the new civil rights movement," I am left asking, "What movement?" As I reflect on my responses, I am frightened and wonder what has gone so wrong with the conversation about diversity, affirmative action, and equality that the concepts seem so less meaningful than they once did.

While I worry about how the MCRI will affect equal access to education, the MCRI may create a positive outcome by encouraging us to ask important unanswered questions: Are affirmative action and diversity, as currently conceived, working well? If not, how might the MCRI revitalize a discussion on legal theories that may benefit those structurally excluded from societal power and opportunity?

## I. THE DIVERSITY DEBACLE AND A CHANCE TO START OVER AFTER THE MCRI

Diversity may be the most overused and least understood term in the current civil rights lexicon: it is ubiquitous and its authority unquestionable.

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Thomas Benton, the pseudonymed columnist for the *Chronicle of Higher Education*, quips in the December 8, 2006 edition that the mantra of diversity has become so pervasive and unquestioned in its meaning and values that it is merely “white noise.” Indeed, in her speech responding to the MCRI’s adoption, President Coleman used the word twenty-one times.

Affirmative action has faltered in recent years, and many of its problems stem from how we think about “diversity,” affirmative action’s main object. Diversity has assumed two different meanings. First and most significantly for individuals, diversity means equal opportunity: as the standard assumption goes, if a student body looks “diverse,” the school must be giving people equal opportunity. Second, diversity can mean viewpoint diversity: an effective educational system must have people with competing ideas.

In recent years, the latter definition has overtaken the former, resulting in a dilution of the focus on equal opportunity, and Court opinions have directly contributed to this change. In *Grutter v. Bollinger*, the Supreme Court held that affirmative actions programs are justified in the educational setting because they create viewpoint diversity, not because they promote equal opportunity. This determination is certainly practical. American courts have difficulty recognizing and articulating structural power inequalities and thus rarely uphold race- or gender-conscious admission based on these policies. Yet this practicality exacts a high price, diverting the focus of affirmative action away from equality of opportunity. Indeed, the justification in *Grutter* is patently demeaning to those of us from “diverse” backgrounds. In essence, the Court and litigants say that non-white, non-straight, non-male folks are needed to teach the good-old-boys’ club what a lack of structural privilege means. In exchange, these diverse candidates are offered admission to a prestigious school.

Not only is viewpoint diversity a poor justification for diversity, it leads many to characterize almost everyone as diverse, again eroding diversity and affirmative action’s focus on equal opportunity. Currently, many organizations emphasize that *diversity* can mean any kind of *difference*: black or white, public high school or private boarding school, cat owner or dog lover, and the list goes on, edging ever closer to the postmodern abyss and away from the pursuit of equal opportunity. Conceiving diversity this way leads to perverse results by transforming privilege, like attending a well-funded public high school, into diversity.

To the extent that diversity implements equal opportunity, the term is beginning to fail because the connection between a denial of equal opportunity and characteristics such as race, gender, and sexual orientation is beginning to come apart, even if only slightly.

The divergence may be best seen in the white gay world. Consider two gay men, one coming of age in the poor, rural South and another in midtown Manhattan during the mid-1990s. Most likely, the man growing up in the South has overcome significant disadvantage due to his sexual orientation. Even surviving to adulthood by avoiding the high rate of gay teen suicide and interpersonal violence toward gays may be a significant accomplishment. While the man from midtown also lived in a heterosexually-centered

culture, he has probably encountered less homophobia and had to overcome fewer struggles. These differences don't make one person better than the other, but they do add meaning and context to each one's accomplishments. Yet under a viewpoint diversity analysis, such as the rationale in *Grutter*, the man from midtown may have more knowledge to share about queer culture than the man from the South and thereby be preferred.

Concern over the causal connection can be seen on both sides of the political spectrum. Well-intended conservatives are leery about affirmative action programs because they believe that not all people with traditionally minoritizing characteristics are equally minoritized. Liberals, like former Justice Sandra Day O'Connor, also articulate the same belief. When placed in this context, her uncharacteristically off-color remark that affirmative action programs will no longer be necessary in twenty-five years makes some sense.

Certainly, this is not to say that the world will be sex- and race-equal anytime soon. The complex connections between these concepts and class continue to evolve and be understood in new ways. As we come to understand these interactions better, however, we are also called to more accurately implement and articulate them.

For this reason, the MCRI forces us to consider and redevelop what affirmative action means, specifically by eliminating consideration of race, gender, and other factors. In fact, these were never the considerations behind affirmative action. Today, affirmative action and diversity mean what they have (or should have) always meant: those who show an incredible ability to progress socially despite the odds have a higher chance of being academically successful. Affirmative action never granted preference based on race, gender, or any other criteria; those symbols were used simply as proxies for achievement against the odds.

While the concept can be stated simply, implementation is difficult. A recent article in the *Chronicle of Higher Education* may offer one solution. ETS, the company that owns the College Board, developed a formula that looks to identify "strivers," or those who have shown academic potential while overcoming adversity. ETS suppressed the research during *Grutter* so that the Court could not look to it as a replacement for race- and gender-conscious admissions. Nonetheless, initial reports suggest that the research is solid and that the formula actually produces equally "diverse" classes without considering race, gender, and the other impermissible factors under the MCRI.

Thus, while at first blush the MCRI appears to thwart affirmative action efforts, it may force universities to more accurately implement the goal behind affirmative action, equal opportunity. By looking to the full spectrum of an applicant's ability to achieve despite adversity—not simply considering race, gender, or other criteria as proxies for such achievement—universities can comply with the law while fulfilling their commitments to equal opportunity.

## II. I PREFER PREFERENCE

The MCRI also holds the potential for positive change because it outlaws “preference” in addition to “discrimination” based on various characteristics. This slight change in language can very beneficial to civil rights claims because preference seems to lack the requirement of bad intent that discrimination claims require. While the concept of diversity has moved toward meaningless babble, discrimination has shown a remarkably tenacious inability to depart from anything other than “invidious” or directly intentional wrongdoing. As Catherine MacKinnon frequently notes in her groundbreaking text *Sex Equality*, a major barrier to both racial and gender equality lies in the Court’s requirement that unconstitutional discrimination claimants show a specific bad intent, or invidious discrimination, specifically linked to either racial or gender characteristics.

*Bray v. Alexandria Women’s Health Clinic* demonstrates the legal impotency of discrimination rhetoric. The case involved a group of abortion protestors who obstructed women’s access to abortion clinics. The women brought suit under a post-Reconstruction constitutional tort that prohibits conspiracies to deprive people of their constitutional rights based on their status in a protected group. Clearly, women belong to a protected class and the Court had already twice affirmed their constitutional right to abortion. Yet, in an opinion only a lawyer could write or understand, Justice Scalia wrote that the abortion protestors had not interfered with the women’s rights—discriminated against them—*because* they were women, but merely *in spite of* their being women. Thus, even where the law clearly seemed to prohibit discriminatory conduct, the Court failed to increase substantive equality by eroding discrimination.

In today’s educational environment, especially in law schools, one need not look hard to find preference, especially in favor of men. This preference is reflected in everything from the subtle to the painfully obvious.

For example, the Law School recently celebrated the success of a faculty member’s litigation in *Hammon v. Indiana*, wherein he argued that the Confrontation Clause limits the government’s ability to prosecute domestic abusers if the victim doesn’t testify. Arguably, this is the worst case of the Supreme Court term for women—people who comprise half the Law School’s enrollment. Yet the Law School celebrated the case as a great victory, apparently ignorant to its substantive impact on women’s lives, health, and freedom, as well as the gendered nature of the Confrontation Clause itself.

Most recently, a study of Harvard Law School’s “gunners,” law students who feel especially empowered in the Socratic environment, revealed that almost all of them are men, and anecdotal evidence suggests this is a widespread phenomenon. From this perspective, law schools design much of what people experience to benefit men and to force women to conform to men’s standards. This critique has been expansively explored by MacKinnon, who is one of the few professors to realize the preferential na-

ture of the Socratic method and attempt to find alternatives that more equally distribute power and preference in the law school classroom.

These examples do not imply that those who run top law schools despise women; most are probably very progressive. I also don't mean to suggest these events only occur at top law schools or only affect women. As an intellectual community, we are just beginning to understand how various practices grant and deny preference.

Given that these understandings are just emerging, litigation based on preference may provide a powerful tool for reaching substantive equality by significantly restructuring how we learn and teach. Further, because preference can be read not to require specific animus, many of these claims may succeed where traditional discrimination claims have failed.

Fresh starts are rare in the legal world. The MRCI offering one such opportunity, and those of us committed to equal opportunity must seize the chance to rethink our prior approaches, advance increasingly progressive legal theories, and ultimately reignite old passions. In our future endeavors, especially in the wake of the MCRI, we can only hope that these efforts will lead us to what Dr. Martin Luther King, Jr. termed "the beloved community."